**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**CRIMINAL APPEAL No. 755 of 2002**

**For Approval and Signature:**

**HON'BLE MR.JUSTICE J.M.PANCHAL**
**AND**
**HON'BLE MR.JUSTICE H.B.ANTANI**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**CHUNILAL SHANKERBHAI KOLI - Appellant**
**Versus**
**STATE OF GUJARAT - Respondent**

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**Appearance :**
MR MJ BUDDHBHATTI for Appellant.
MS HANSA PUNANI, APP for Respondent.

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**CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL**
**and**
**HON'BLE MR.JUSTICE H.B.ANTANI**

**Date : 18/07/2005**

**ORAL JUDGMENT**

**(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)**

Instant appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973 *(“the Code” for short),*

is directed against judgment dated September 13, 2002 rendered by the learned Additional Sessions Judge, Dhrangadhra, District Surendranagar, in Sessions Case No.34 of 2000 by which the appellant, who was original accused No.1, is convicted under Sections 304 Part-II and 323 of the Indian Penal Code (*"IPC" for short)* and Section 135 of the Bombay Police Act, 1951 *("the Act" for short),* whereas Jashabhai Shankerbhai Koli, who was original accused No.2, is convicted under Section 323 IPC as well as Section 135 of the Act, and the appellant is sentenced to suffer R.I. for ten years and fine of Rs.1,000=00, in default S.I. for three months, for commission of offence punishable under Section 304 Part-II IPC whereas Jashabhai Shankerbhai Koli is sentenced to suffer R.I. for one year and fine of Rs.501=00 for commission of offence punishable under Section 323 IPC and Section 135 of the Act. It may be stated that though the appellant is convicted under Section 323 IPC and Section 135 of the Act, no separate punishment is imposed on him for commission of offences punishable under those provisions.

2. The facts emerging from the record of the case are as under:

Complainant Hirabhai Valjibhai Koli is residing at Village Ranchhodgadh, Taluka : Dhrangadhra, District : Surendranagar, and is running a *pan-gulla.* The incident in question took place on August 23, 2000. It was the birth day of Lord Krishna, the 8th day of the dark half of *Shravan* month. There is an area known as Popatmadh in Village Ranchhodgadh wherein a temple is located. As it was the birth day of Lord Krishna, about 200 women folk of the village were dancing and singing in circular manner. At that time, Shambhubhai, who is brother of complainant Hirabhai, was playing drum. The appellant without rhyme or reason came their and slapped Shambhubhai saying that he was not playing drum properly. Thereupon, complainant Hirabhai took his brother Shambhubhai to his *pan-gulla.* Meanwhile, deceased Raiyaben, who was sister of complainant and Shambhubhai, came and asked Hirabhai as to what had happened. Hirabhai informed her that Shambhubhai was slapped by the appellant. Hirabhai thereafter asked his sister Raiyaben to take Shambhubhai to their house. At that time, Raiyaben was accompanied with her niece Vilash also. After sometime, Vilash came running to *pan-gulla* and informed the complainant that Raiyaben was assaulted by the appellant and his brother Jashabhai. She informed Hirabhai that the appellant caused injury on head of

Raiyaben by means of an iron-pipe whereas Jashabhai caused injury on her back by means of a stick. On learning this information, complainant Hirabhai rushed home. He removed injured Raiyaben to dispensary situated at Village Charadava. The Doctor on duty found that serious injuries were received by Raiyaben and, therefore, advised the complainant to remove her to Morbi Hospital. Accordingly, Raiyaben was taken to Morbi Hospital where the Doctor on duty declared her brought dead. The Doctor, in turn, informed the PSO of Morbi City Police Station about the same. The PSO of the said Police Station informed Mr.S.P.Patel, who was then PSI of the Police Station about the fact that Raiyaben had lost her life in a scuffle. Therefore, PSI Mr.Patel went to the Government Hospital, Morbi, and recorded the complaint as narrated by complainant Hirabhai Valjibhai Koli. He held inquest on the dead body of the deceased and made arrangements for sending the dead body to Medical Officer for postmortem examination. The Police Officer in charge of Morbi City Police Station sent the complaint to Halvad Police Station for investigation. After registering the offences, PSO of Halvad Police Station handed over further investigation into the case to PSI Mr.Varu. Mr.Varu visited the place of offence and drew panchnama of the place of incident in presence of panch witnesses.

He also seized certain incriminating articles from the place of incident and recorded statements of those persons who were found to be conversant with the facts of the case. During the course of investigation, the appellant and his brother were arrested on August 25, 2000 and their clothes as well as weapons produced by them were seized under a *panchnama.* The articles, which were seized during the course of investigation, were sent to Forensic Science Laboratory for analysis. On completion of investigation, the appellant and his brother were chargesheeted in the Court of learned Judicial Magistrate First Class, Halvad, for commission of offences punishable under Sections 302, 447, 323 read with 114 IPC.

3. As the offence punishable under Section 302 IPC is exclusively triable by a Court of Sessions, the case was committed to the Sessions Court, Surendranagar, for trial where it was numbered as Sessions Case No.34 of 2000. The learned Additional Sessions Judge, Dhrangadhra, to whom the case was made over for trial, framed charge against the appellant and his brother at Exh.16 for commission of offences punishable under Sections 302 and 323 read with Section 34 IPC and Section 135 of the Act. The charge was read over and explained to the accused.

They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (1) Dr.Mahendrabhai Amrutlal Sanghavi as P.W.-1 at Exh.26; (2) Hirabhai Valjibhai as P.W.-2 at Exh.29; (3) Shambhubhai Valjibhai as P.W.-3 at Exh.31; (4) Savjibhai Ratubhai as P.W.-4 at Exh.33; (5) child witness Vilashben Hirabhai as P.W.-5 at Exh.34; (6) Jayantibhai Labhubhai as P.W.-6 at Exh.35; (7) Kantilal Gokalbhai as P.W.-7 at Exh.37; (8) Karshanbhai Vihabhai as P.W.-8 at Exh.40; (9) Babubhai Jivabhai as P.W.-9 at Exh.42; (10) Godavariben Avcharbhai as P.W.-10 at Exh.43; (11) Somiben Gelabhai as P.W.-11 at Exh.44; (12) Hakabhai Arjanbhai as P.W.-12 at Exh.45; (13) Shankerbhai Pitamberbhai Patel as P.W.-13 at Exh.46; (14) Ashwinkumar Rameshchandra as P.W.-14 at Exh.50; and, (15) Shravanbhai Rambhai Varu as P.W.-15 at Exh.51, to prove its case against the appellant and his brother. The prosecution also produced documentary evidence such as inquest report of the deceased at Exh.23; panchnama of seizure of clothes of deceased Raiyaben at Exh.24; postmortem notes of deceased Raiyaben prepared by Shanghvi produced at Exh.28; notification issued by the competent authority under the provisions of Section 37(1) of the Act at Exh.22; complaint lodged by Hirabhai at Exh.30; panchnama of place of incident at Exh.36; map of place of incident at Exh.39; panchnama of

clothes and weapons produced by the accused at Exh.41; extract from station diary at Exh.47; report of Forensic Science Laboratory at Exh.55, etc. in support of its case against the accused.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellant and his brother the circumstances appearing against them in the evidence of prosecution witnesses, and recorded their further statements as required by Section 313 of the Code. In further statements, the case of the appellant and his brother was that they were innocent. Both the accused submitted further statement in writing at Exh.60. In the written statement, it was mentioned that on the day of incident, the appellant was present in his house and at that time, deceased Raiyaben was uttering filthy abuses near his house as a result of which, the appellant had come out of his house and persuaded deceased Raiyaben not to utter abuses, but the deceased had refused to pay heed to such request, and as the deceased had continued to abuse, the appellant was provoked and had given slap on her cheek, after which the deceased had started running towards her house and while running had fallen down on a big stone as a result of which she had sustained injuries and had become

unconscious but no injury was caused to her either by the appellant or his brother. To substantiate the case pleaded in the written statement, the appellant, i.e. original accused No.1, examined himself as Defence Witness (D.W.)-1 at Exh.61 whereas Jashabhai, who was original accused No.2 examined himself as D.W.-2 at Exh.62. The accused also examined Shankerbhai Gangarambhai as D.W.-3 at Exh.65 and Narshibhai Kukabhai Koli as D.W.-4 at Exh.66. After examining the defence witnesses, the accused submitted written arguments at Exh.68 for consideration of the Court.

5. On appreciation of evidence adduced by the parties, the learned Judge of the trial Court held that it was proved by the prosecution beyond reasonable doubt that deceased Raiyaben died a homicidal death. The learned Judge found that it was established by the prosecution that the appellant No.1 delivered blow with an iron-pipe on head of deceased Raiyaben whereas his brother Jashabhai injured her by causing a stick-blow on her back. The learned Judge noticed that deceased Raiyaben was uttering abuses as a result of which the appellant had delivered blow with the iron-pipe on her head and as the appellant had not assaulted the deceased with pre-meditation and had caused only one injury, he

was liable to be convicted under Section 304 Part-II and not under Section 302 IPC. The learned Judge further found that no reliable evidence was adduced by the prosecution to prove that criminal act was done by accused Jashabhai in furtherance of common intention of the appellant and, therefore, Jashabhai was not liable to be convicted with the aid of Section 34 IPC. In view of abovereferredto conclusions, the learned Judge has convicted the appellant under Sections 304 Part-II, 323 IPC and Section 135 of the Act as well as Jashabhai under Section 323 IPC & Section 135 of the Act and imposed sentences on them referred to earlier by judgment dated September 13, 2002 giving rise to instant appeal.

6. It may be stated that Jashabhai Shankerbhai Koli, who was original accused No.2 and who is convicted under Section 323 IPC as well as Section 135 of the Act, has not challenged his conviction as well as sentence imposed on him by the learned Judge of the trial Court, and accepted the same. It is also worthwhile to notice that feeling aggrieved by the acquittal of both the accused under Section 302 IPC, the State of Gujarat had filed Criminal Appeal No.1080 of 2002, but that appeal has been dismissed by the Division Bench comprising D.K.Trivedi & S.R.Brahmbhatt, JJ. vide order dated

December 21, 2004. It is not pointed out by the learned Additional Public Prosecutor for the State that judgment dated December 21, 2004 rendered in Criminal Appeal No.1080 of 2002 is challenged before higher forum. Thus, acquittal of the appellant and his brother under Section 302 IPC has become final and cannot be gone into by this Court in instant appeal.

7. Mr.M.J.Buddhbhatti, learned counsel of the appellant, submitted that child witness Vilashben was a got-up and tutored witness and as her evidence is not supported by medical evidence and/or any other evidence on record, her evidence should not have been relied upon by the learned Judge of the trial Court for fastening criminal liability on the appellant. It was argued that though sufficient time was available to the complainant to lodge complaint when deceased Raiyaben was first removed to Charadava Dispensary for treatment, the complaint was lodged only after the deceased was removed to Civil Hospital, Morbi and as unreasonable delay in lodging the complaint is not explained by any of the prosecution witnesses, the prosecution case should have been disbelieved as not inspiring confidence of the Court. According to the learned counsel of the appellant, the defence evidence tendered by the appellant and his

brother completely exonerates the appellant and as the learned Judge of the trial Court has failed to appreciate the evidence in its proper perspective, the impugned judgment should be set aside. The learned counsel of the appellant drew the attention of the Court to omissions appearing in the evidence of witnesses with reference to their earlier police statements, and argued that as the witnesses examined by the prosecution are unreliable, the appeal should be allowed. In the alternative, it was argued that the learned Judge of the trial Court was not justified in imposing maximum punishment of R.I. for ten years prescribed for commission of offence punishable under Section 304 Part II IPC and as the appellant has, by this time, undergone sentence of five years, eight months and nineteen days with remission, the sentence undergone by him should be imposed on him for commission of offence punishable under Section 304 Part II IPC.

8. Ms.Hansa Punani, learned Additional Public Prosecutor for the State, argued that neither the evidence of Vilash indicates that she is a tutored witness nor does it in any manner show that she is a got up witness and, therefore, the learned Judge of the trial Court, who had advantage of observing demeanour of witnesses, was justified in placing reliance on her

testimony for the purpose of convicting the appellant under Section 304 Part-II IPC. According to the learned Additional Public Prosecutor for the State, all the three witnesses have tendered their evidence in natural manner without making noticeable improvements and/or embellishments and as the defence has failed to impeach their credibility, well-founded conviction of the appellant under Section 304 Part II IPC should be upheld by this Court. What was maintained by the learned counsel for the State before the Court was that it was not suggested by the defence that any of the prosecution witnesses was on inimical terms with either the appellant or his brother and as false implication of the appellant stands completely ruled out, the well-reasoned judgment should be confirmed by this Court. The learned counsel emphasized that cogent and convincing reasons have been assigned by the learned Judge of the trial Court for convicting the appellant under Section 304 Part II IPC, and as the learned counsel of the appellant has failed to dislodge them, the appeal, which lacks merits, should be dismissed. While dealing with the alternative submission advanced by the learned counsel of the appellant with regard to sentence imposed on the appellant, the learned Additional Public Prosecutor for the State contended that the blow was given by the

appellant with such a great force on vital part of the body that the deceased had lost her life within no time and, therefore, the punishment imposed on the appellant should be confirmed by this Court having regard to the facts and circumstances of the case.

9. This Court has heard Mr.M.J.Buddhbhatti, learned counsel of the appellant, and Ms.Hansa Punani, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

10. The fact that deceased Raiyaben died a homicidal death is not in dispute. Though an attempt was made by the defence to establish that she died an accidental death, Dr.Mahendrabhai Sanghvi, who had performed autopsy on the dead body of the deceased, has categorically stated that the injuries, which were noticed by him while performing postmortem examination of the deceased, are not possible by fall as suggested by the defence. The injuries sustained by the deceased are mentioned in the inquest report which is produced at

Exh.23. The injuries are enumerated in detail in his substantive evidence before the Court by Dr.Sanghvi. He stands fully corroborated by contemporary evidence, namely, postmortem notes of the deceased prepared by him and produced by the prosecution at Exh.28. On the facts and in the circumstances of the case, this Court is of the firm opinion that the learned Judge of the trial Court was not justified in coming to the conclusion that it was proved by the prosecution that the deceased died a homicidal death. The said finding being eminently just is hereby upheld.

11. The plea that child witness Vilash, whose real paternal aunt lost life in the incident, is a got up and tutored witness and, therefore, the prosecution case should be thrown over board cannot be accepted. The child has deposed in a most normal manner. She has unfolded the whole prosecution case without making noticeable improvements and/or embellishments. It is true that during the course of her cross-examination, she was confronted with her earlier police statement and that the defence was successful in bringing certain omissions on record of the case. However, a bare perusal of the omissions makes it very clear that those omissions are trivial in nature and do not affect the substratum of the

prosecution case. The omissions, which have been brought on record, would on the contrary indicate that the witness was not tutored nor was got up. Child witness Vilash has, in terms, stated that the appellant had delivered iron blow on head of her paternal aunt as a result of which, her paternal aunt had fallen down. Though the child witness was subjected to gruelling cross,, nothing could be brought on record to impeach her credibility. Even remotely it could not be suggested to her that she was on inimical terms or that her father and uncle were on inimical terms with the appellant or his brother and, therefore, at their instance, she was giving false testimony before the Court. The learned Judge of the trial Court, who had advantage of observing demeanour of the witnesses, has believed this witness and in absence of good grounds, this Court cannot disbelieve the child witness. On the facts and in the circumstances of the case, this Court is of the opinion that it is proved by the prosecution beyond reasonable doubt that on the day of incident, the appellant had delivered a blow with iron-pipe on the head of the deceased and caused injury to her.

12. Child witness Vilash stands fully corroborated by medical evidence on record tendered by Dr.Sanghvi at

Exh.26 as well as postmortem notes of the deceased produced by the prosecution at Exh.28 regarding injury sustained by the deceased on her head. The doctor has clearly and unequivocally asserted before the Court that the injury found on the head of the deceased was possible by an iron-pipe, which was shown to him during the course of recording of his testimony. Further, the testimony of witness Vilash also stands corroborated by the testimony of complainant Hirabhai examined at Exh.29 and witness Shambhubhai examined at Exh.31. It is worth noting that complainant Hirabhai as well as witness Shambhubhai have referred to presence of child witness Vilash at the time of incident. Thus, on appreciation of evidence, this Court finds that commission of offence punishable under Section 304 Part II IPC by the appellant is firmly established by the prosecution.

13. At this stage, it would be interesting to notice the defence evidence tendered by the appellant and his brother as well as their witnesses. The appellant has admitted in his substantive evidence before the Court that he had slapped the deceased and that the deceased had sustained injuries when she had fallen down on a rock. However, possibility of the deceased sustaining injury by fall on the rock is completely ruled out by

Dr.Sanghvi. Therefore, participation of the appellant in the commission of offence becomes clear if one peruses defence evidence adduced by the appellant and his brother.

14. The net result of the above discussion is that the conviction of the appellant under Section 304 Part II IPC is well founded and no case is made out by the learned counsel of the appellant to interfere with the same in instant appeal.

15. This brings the Court to consider the question whether punishment imposed on the appellant for commission of offence punishable under Section 304 Part II is harsh and excessive.

The record does not show that there was any previous enmity between the appellant and deceased Raiyaben or between the appellant and complainant Hirabhai or the appellant and witness Shambhubhai. The defence evidence tendered by Shankerbhai Gangarambhai at Exh.65 and Narshibhai Kukabhai Koli at Exh.66 would show that deceased Raiyaben was hurling filthy abuses at the appellant and his brother and that both of them had persuaded the deceased to desist from abusing them.

Their evidence further shows that the deceased had not heeded to their request and, therefore, because of grave provocation, the appellant had delivered a single blow on her head. It is relevant to notice that the appellant had thereafter not attempted to cause any further injuries to the deceased. It is true that law provides maximum punishment of ten years for commission of offence punishable under Section 304 Part II IPC. However, while considering the adequacy or otherwise of the sentence imposed by the trial Court, the Court cannot be oblivious to the manner in which the incident had taken place and the circumstances under which it had occurred. The case on hand cannot be described to be worst case under Section 304 Part II warranting imposition of maximum sentence of R.I. for ten years. During the course of hearing of the appeal, the learned Additional Public Prosecutor has produced copy of Jail Remarks Sheet of the appellant, which indicates that, by this time, the appellant has undergone sentence of R.I. for five years, eight months and nineteen days with remission. On the facts and in the circumstances of the case, this Court is of the opinion that interest of justice would be served if the appellant is sentenced to R.I. for the period which has already been undergone for commission of offence punishable under Section 304 Part II IPC.

16. For the foregoing reasons, the appeal partly succeeds. The conviction of the appellant under Sections 304 Part-II and 323 IPC as well as Section 135 of the Act as recorded by the learned Judge of the trial Court vide judgment dated September 13, 2002 rendered in Sessions Case No.34 of 2000 is hereby maintained and upheld. However, the sentence imposed on him is modified. Instead of R.I. for ten years and fine of Rs.1,000=00, in default S.I. for three months, imposed on him by the trial Court for commission of offence punishable under Section 304 Part-II IPC, the appellant is sentenced to R.I. for five years, eight months and nineteen days, and fine of Rs.1,000=00, in default S.I. for three months, for commission of offence punishable under Section 304 Part-II IPC. As the appellant has undergone the sentence imposed on him for commission of offence punishable under Section 304 Part-II IPC and as no separate sentences are imposed on him for commission of offences punishable under Section 323 IPC and Section 135 of the Act, the respondent shall release the appellant forthwith unless his presence is needed with reference to any other case. The appeal is allowed to the extent indicated hereinabove only. Muddamal be disposed of in terms of directions given by the learned Judge of the trial Court in the

impugned judgment.

(J.M.PANCHAL, J.)

(H.B.ANTANI, J.)

*Rajendra*